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THE ALEPH INSTITUTE

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National Liberator

The Newsletter of Life for America's Jews in Institutional Environments

Dear Friends,

Here is a report that may prove critical to you and others at your facility.

As you know, The Aleph Institute is dedicated not only to the spiritual health of the incarcerated, but also to the welfare of family and community. In our experience, the trauma of extended separation creates many societal problems, both for the offender in prison and for family, children, businesses and community left behind.

It is for that reason that Aleph has long been involved in sentencing proceedings around the country, providing defendants and their attorneys with quality counseling and support. Wherever possible, our staff works with a defendant's attorneys and submits to sentencing courts detailed proposals that espouse alternatives to extended incarceration and accompanying separation.

Just a few weeks ago, the United States Supreme Court issued a momentous ruling, in the case of *Blakely v. Washington*, that appears to have wide-ranging implications to the sentences of tens of thousands of inmates. We asked our former Director of Legal Affairs, Isaac M. Jaroslawicz, to prepare an easily-readable analysis of this decision and its possible ramifications to inmates and their families.

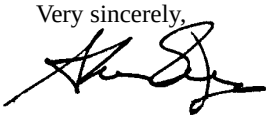
Please accept a copy of this brief analysis with our compliments. If you, your family or anyone else at your facility has any questions or thoughts, you may contact Robert Burns, care of our office here at Aleph. While Aleph cannot provide legal advice, we may be able to direct you appropriately nationwide.

Everyone at Aleph sends their best wishes for the summer, and is here to provide critical support to you and your families during these difficult times.

As the High Holidays are approaching, if there is any way we can be helpful to make them spiritually more meaningful, please let us know.

With Torah greetings and blessings, I am,

Very sincerely,



Rabbi Sholom D. Lipskar

U.S. Supreme Court Issues Decision Predicted to "Wreak Havoc" With Trial Courts

Isaac M. Jaroslawicz, Esq.

On June 24, 2004, the United States Supreme Court issued a momentous decision, *Blakely v. Washington*, that has thrown state and federal courts into a virtual tizzy. Essentially, the Court ruled that the procedures used to enhance sentences under the Washington state sentencing guidelines violated our constitution's Sixth Amendment right to a jury. The decision potentially affects all states using similar guidelines and procedures, and seems to call into question the constitutionality of the entire federal sentencing guidelines procedure.

But the decision also may affect any sentence imposed over the past four years. Any offender who was sentenced since June, 2000, under state or federal guidelines, and whose sentence included any upward enhancements or departures above what would otherwise have been the guideline range, may have a valid basis to challenge those enhancements, whether by a section 2255 motion or habeas corpus petition. It will be a while until things settle down, but state and federal inmates -- and their families – need to review the circumstances surrounding their own sentences – and keep abreast of developments.

So, what exactly happened?

The United States Supreme Court applied to a sentence increased under a guideline system a rule it had first expressed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

The *Blakely* opinion essentially said, "we mean what we said in *Apprendi*," and that it applied to state guideline enhancements. Most important, *the Court applied the highest expected sentence under the standard Guidelines* as the "statutory maximum," rather than the official statutory max. Blakely was sentenced to 90 months when the official statutory maximum was 10 years. But the Washington State Guidelines provided for only 53 months before enhancements for extraordinary aggravating circumstances. Facts routinely used to enhance a defendant's sentence must be supported by a jury's positive finding to pass constitutional muster, the Court said.

Although the Court was dealing with Washington State guidelines and specifically noted it was not dealing with the federal guidelines, Justice O'Connor's dissent expressly notes, "The structure of the Federal Guidelines likewise does not . . . provide any grounds for distinction. Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. section 3553(b) and implemented in USSG section 5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack." [!!]

Another decision rendered on June 24, *Schriro v. Summerlin*, throws into question whether the *Blakely* decision will have retroactive effect on sentencing judgments that had not become final before the decision was rendered. An argument may be made, in habeas or 2255 applications, that *Blakely* simply applied the rule stated in *Apprendi*, so any sentences imposed -- or which were still subject to direct appeal -- since the *Apprendi* decision in 2000 that involved unstipulated upward departures or enhancements may be subject to attack.

As Justice O'Connor noted in her dissent, the numbers available from the federal system alone are "staggering." As of March 31, 2004, there were 8,320 federal appeals pending in which the sentence was at issue. Between June 27, 2000, when Apprendi was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court, the vast majority of which were under the Guidelines.

Justice O'Connor worried that, "[t]he court ignores the havoc it is about to wreak on trial courts across the country." Indeed, offenders and their families need to take practical steps to see whether their cases are affected.

Among the questions that need to be answered:

1. When was the sentence imposed? When did the conviction become final (at the end of all appeals)? After June 27, 2000?
2. Was the case state or federal? As noted above, the federal sentencing guidelines have already been identified as likely similar to the guidelines thrown out from the State of Washington. The *Blakely* decision also identified other state guidelines systems that may be vulnerable, including Alaska, Arkansas, Florida, Kansas, Michigan, Minnesota, North Carolina, Oregon, and Pennsylvania. Justice O'Connor notes that the *Blakely* decision "casts constitutional doubt over them all."
3. Was there an upward departure? These are most clearly vulnerable under the *Blakely* precedent.
4. Were any enhancements applied? In drug cases, enhancements might include the weight of drugs involved. In fraud cases, enhancements would likely include the total "loss," the defendant's "role" in the offense, etc. Each case, state or federal, has its own circumstances that need to be reviewed carefully.
5. Were underlying facts admitted in any plea agreement or otherwise? Copies of the indictment and plea agreements, transcripts of any allocutions (both change of plea hearings and sentencings), and copies of all pre-sentencing reports should be collected and reviewed.

The answers to these questions could determine whether persons whose appeals or appeal time ended since June 27, 2000, could have their sentences reduced.

After serving for more than eight years as Aleph's Director of Legal Affairs, Isaac M. Jaroslawicz has returned to private practice in Miami, Florida.

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